IN THE SUPREME COURT OF PENNSYLVANIA

No. 76 MAP 2019
No. 77 MAP 2019

UNIONTOWN NEWSPAPERS, INC., *d/b/a* THE HERALD STANDARD, and CHRISTINE HAINES,

Appellees,

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

Appellant.

APPELLEES' BRIEF

Appeals by allowance from the Orders of the Commonwealth Court of Pennsylvania (Simpson, J.) at No. 66 MD 2015 issued on March 23, 2018 and October 29, 2018

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COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In its Statement of the Scope and Standard of Review, Appellant, Pennsylvania Department of Corrections (the "DOC"), correctly notes that pure issues of law, such as statutory interpretation questions regarding the Pennsylvania Right to Know Law, are subject to a *de novo* standard of review and plenary scope of review. Bowling v. Office of Open Records, 75 A.3d 453, 466 (Pa. 2013).

However, many of the issues raised and briefed by the DOC are questions of fact, which renders the Court's purview on this appeal much narrower. For factual issues, the Court is generally "limited to determining whether findings of fact are supported by competent evidence or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision." See Kaplin v. Lower Merion Twp., 19 A.3d 1209, 1213 n. 6 (Pa. Commw. Ct. 2011) (regarding the function of the Commonwealth Court on appeal from the Court of Common Pleas under the Pennsylvania Right to Know Law). See also McShea v. City of Philadelphia, 995 A.2d 334, 338 (Pa. 2010) ("When this Court entertains an appeal originating from a non-jury trial, we are bound by the trial court's findings of fact, unless those findings are not based on competent evidence . . . .") (quoting Triffin v. Dillabough, 716 A.2d 605, 607 (Pa. 1998)).

COUNTER-STATEMENT OF THE CASE

I. BACKGROUND

Appellee, Uniontown Newspapers, Inc., *d/b/a* The Herald Standard (the "Newspaper"),[1] is a community newspaper located in Western Pennsylvania primarily serving Fayette, Washington, Westmoreland, and Greene Counties. (R. 1140a:25-1141a:1). The State Correctional Institution in Fayette County, Pennsylvania ("SCI-Fayette"), lies within the Newspaper's primary coverage area, is a prison situated near a 500-plus-acre fly ash dump,[2] and is serviced by the nearby Tri-County Joint Municipal Authority (the "Water Authority"). (R. 1139a:21-25, 1141a:6-8, 1142a:14-1143a:25). SCI-Fayette is operated by Appellant, the Pennsylvania Department of Corrections (the "DOC").

In early 2014, the Newspaper became aware of potential toxins in the water supply from the Water Authority, other possible health and safety violations by the Water Authority, and potential health and environmental impacts related to the adjacent fly ash dump. (R. 1138a:3-1140a:22). In addition to the potential health impacts on SCI-Fayette, the Newspaper was concerned for the overall wellbeing of the citizens living in nearby communities. (R. 1144a:8-21, 1146a:10-22).

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[1] Christine Haines was a reporter at the Newspaper and individual who originally submitted the Newspaper's request to Appellant under the Pennsylvania Right to Know Law. The Herald Standard is currently owned, following an acquisition, by Central Pennsylvania Newspapers, LLC ("CPN"). As part of the acquisition, this litigation was assigned to CPN.

[2] Fly ash is a product of coal combustion during the generation of electrical power.

Due to its more static population when compared to the fluctuating citizenship of nearby towns, the Newspaper viewed SCI-Fayette as a "great incubator" to study various disease rates, and decided to inquire of the DOC as to the kinds and rates of illnesses at the prison versus the DOC system wide. (R. 1145a:2-9). To understand and report on the health risks posed not just to prisoners and employees of SCI-Fayette, but also potentially the community at large, the Newspaper wanted to be able to, among other things, evaluate the rate of prisoners afflicted with illnesses with the aid of experts. (R. 1145a:12-22).

A. The Abolitionist Law Center/Human Rights Coalition Report

The Abolitionist Law Center and Human Rights Coalition, two non-profit, public interest entities located in Pittsburgh, Pennsylvania, published a report separate and apart from the Newspaper and its investigative journalism titled: "No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette." (R. 956a) (the "Abolitionist Report"). The Abolitionist Report summarized a year-long investigation by the organizations into a much narrower issue than pursued by the Newspaper in its open records request. The non-profits focused only on the health impact of exposure to the fly ash dump near SCI-Fayette on the inmates. According to the Abolitionist Report, inmates experienced an alarming rate of respiratory illnesses, pre-cancerous growths, and cancers. (See id., generally).

B. The DOC's Investigation into the Abolitionist Report

In response to the Abolitionist Report, the DOC launched an internal investigation (the "Abolitionist Investigation"). (R. 1160a:6-8, 1168a:13-16). Christopher Oppman, formerly Director of the Bureau of Healthcare Services within the DOC, initiated and oversaw this Investigation. (R. 1160a:9-14).

During the Abolitionist Investigation, the DOC reviewed a number of sources of information, including: (a) "Chronic Care Clinic" related to pulmonary diseases (R. 1161a20-1162a:1, 1163a:9-13); (b) "Mortality Lists" (R. 1164a:7-12); (c) an "Oncology Database" (R. 1164a:24-1165a:1, 1165a:19-22); (d) reports from the DOC's pharmaceutical vendor regarding inmates suffering from respiratory and gastrointestinal diseases (R. 1166a:14-1167a:11); (e) inmate medical records (R. 1167a:12-14); and (f) the DOC consulted with the Pennsylvania Department of Health. (R. 1167a:15-23). The Abolitionist Investigation specifically focused on cancer rates, cancer deaths, respiratory disease rates, pulmonary disease rates, and gastrointestinal disease rates at SCI-Fayette compared to other DOC facilities. (See R. 1089a) (DOC Press Release describing the Abolitionist Investigation).

Ultimately, the Abolitionist Investigation returned a positive outcome for the DOC. (R. 1168a:1-24, 1247a:3-16). The DOC concluded, for instance, that its Abolitionist Investigation "found no evidence of any unsafe environmental conditions or any related medical issues" at SCI-Fayette. (R. 1089a). Given these

results, the DOC wanted to broadly publicize the conclusions, which it did (R. 1169a:5-12; see also R. 1089a), and hoped to use the Newspaper's Request as another outlet to broadcast its rebuttal of the Abolitionist Report.

II. THE NEWSPAPER'S RIGHT-TO-KNOW LAW REQUEST AND THE DOC'S RESPONSE TO THE NEWSPAPER'S REQUEST

A. The Newspaper's Right-to-Know Law Request to the DOC

On September 25, 2014, the Newspaper sent the following open records request to the DOC pursuant to the Pennsylvania Right-to-Know Law ("RTKL"):

> I am seeking documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette. I am not seeking identifying information, only the types of reported contracted illnesses and the number of inmates or staff members with those illnesses. I am particularly interested in various types of cancer reported at SCI-Fayette since its opening, as well as respiratory ailments reported. If there is also information comparing the health at SCI-Fayette with the health at other state correctional facilities, that would also be helpful.

(R. 987a) (the "Request").

The Request was not strictly confined to cancers and respiratory ailments (*i.e.*, those diseases at issue in the Abolitionist Report), or constrained to any other specific disease or category of illnesses. (R. 1153a:10-15; see also R. 987a). Instead, the Newspaper was interested in information regarding *any* illness. (See, e.g., R. 987a; see also R. 1153a:16-21; 1154a:13-17; 1154a:24-1155a:2).

B. The DOC Did Not Search for Responsive Documents

The Request was originally received by Andrew Filkosky, the DOC Agency Open Records Officer (the "AORO").[3] (R. 1253a:21-23). Notably, the DOC understood that the Newspaper's focus[4] was not strictly on illnesses at SCI-Fayette, but that its "bigger concern was the community at large." (R. 1229a:14-21).

The AORO understood that the Newspaper had not asked for the results of the DOC's Investigation into the Abolitionist Report. (R. 1268:18-20). Nonetheless, the AORO "got the impression that other than the investigation, the only records that would exist would be inmates' medical records." (R. 1257a:1-3). The AORO did nothing to confirm this "impression." (R. 1263a:14-1264a:19).

Filkosky forwarded the Request to the DOC Bureau of Healthcare Services, but performed no search for responsive documents himself. (R. 1267a:10-17). Oppman, formerly Director of the Bureau of Healthcare Services at the DOC, was the "go-to person for anything having to do with medical care at the DOC." (R. 1156a:10-12, 1157a:5-9). Oppman had some informal knowledge of the DOC's RTKL procedures, but never received training or written procedures while

[3] The AORO is the point-person for receiving and responding to RTKL requests. See, e.g., 65 P.S. §67.502 (Open-records officer).

[4] The DOC should not attach a presumed purpose to a RTKL request or unilaterally narrow the scope of the request. (R. 16268a:1-20). In fact, the requestor's purpose behind a request is irrelevant. UnitedHealthcare of Pa., Inc. v. Pa. Dep't of Human Servs., 187 A.3d 1046, 1051 n. 4 (Pa. Commw. Ct. 2018) ("The status of the party requesting the record and the reason for the request, good or bad, are irrelevant under the RTKL.").

at the DOC regarding the RTKL or how to respond to requests. (R. 1157a:22-1158a:12). Despite his inexperience and lack of training, Oppman was often charged with responding to RTKL requests related to healthcare or medical issues at the DOC. (R. 1158a:13-24). Overall, Oppman led the DOC's response to the Newspaper's Request, and was, in his estimation, best positioned among anyone at the DOC to do so. (R. 1169a:22-1170a:8).

Ultimately, without support, the DOC lumped the Newspaper's Request into the same substantive bucket as the DOC's Abolitionist Investigation. (R. 1171a:20-24). Oppman was instructed by the DOC's internal counsel simply to pull information from the Abolitionist Investigation in response to the Request. (R. 1175a:14-20). All of the documents released to the Newspaper in response to its Request, at least prior to the Newspaper's enforcement action, came from the Abolitionist Investigation. (R. 1176a:5-14). The DOC's focus in disposing of the Request was confined to gathering documents solely from the Abolitionist Investigation. (R. 1177a:11-21). Oppman agreed that the DOC merely "repackaged the results of the investigation into the Abolitionist report . . . ." (R.

1179a:14-17). The DOC "assumed" that the Newspaper was "looking for" the results of the Abolitionist Investigation. (R. 1179a:3-6).[5]

Oppman, who was "in the best position to determine the universe of responsive documents" to the Request, (R. 1178a:15-20), admitted no one at the DOC made any independent search for documents in response to the Request:

> Q: And aside from gathering documents from that investigation, you didn't perform any – any search for other documents in response to the newspaper's request, right?
>
> A: No . . . .

(R. 1177a:22-25). He was not aware of *anyone* who searched. (R. 1179:7-13).

The DOC never searched any other documents or databases outside of its work related to the Abolitionist Investigation because it purportedly "already knew what it had" by virtue of its separate and preexisting Abolitionist Investigation. (R. 1212a:18-22). Overall, the DOC's true focus remained on responding to and rebutting the Abolitionist Report, not the Newspaper's Request. (R. 1174a:17-19).

C. The Lack of Relationship Between the Abolitionist Report/Abolitionist Investigation and the Newspaper's Request

The Newspaper's inquiry into the potential impact of the Water Authority and the fly ash dump on SCI-Fayette and surrounding communities preceded any

[5] This DOC presumption also neatly fit with the agency's decision to publicize the results of the its Abolitionist Investigation, which portrayed the DOC in a positive light following the public relations damage of the Abolitionist Report. (See, e.g., R. 1089a) (DOC Press Release describing the Abolitionist Investigation).

knowledge of the Newspaper that the Abolitionist Report existed. (R. 1145a:23-1146a:2). The Abolitionist Report did not prompt the Request. (R. 1146a:3-9).

The DOC confirmed that its Abolitionist Investigation was not launched to search for documents responsive to the Newspaper's Request. (R. 1161a:17-19). The Abolitionist Report made no mention of the Newspaper, while the Request made no mention of the Abolitionist Report. (R. 1170a:13-1171a:2). The DOC did not ultimately understand the Newspaper's Request as only seeking documents related to the subject-matter of the Abolitionist Report, even though Abolitionist Investigation-related documents were all that the DOC produced to the Newspaper. (R. 1172a:12-16, 1173a:2-4). While the Abolitionist Report was issued before the Request, this timing was merely "coincidental." (R. 1151a:20-23, 1171a:23-24).

The DOC understood the Abolitionist Report as focusing only on cancers, respiratory ailments, and gastrointestinal diseases. (R. 1159a:19-24). The Request, however, was not limited only to these categories. (R. 987a; see R. 1171a:3-23). When discussing the DOC's response to the Request in 2015, the Newspaper advised the DOC that its Request was not merely seeking information regarding the Abolitionist Investigation/Abolitionist Report. (R. 1094a-1095a; see also R. 1212a:13-17). In response, the DOC, through in-house counsel, confirmed: "I understand. We do not have any such records that are that specific beyond going through every medical record, which is not required." (R. 1094a).

The DOC further understood the Newspaper's Request as seeking information regarding "illnesses contracted by SCI-Fayette, by type and quantity . . . and comparison of illness rates at other SCIs." (R. 1172a:5-1173a:4). The DOC's interpretation of the Newspaper's Request did not change from its original review of the Request through RTKL appeals. (R. 1216a:6-9). Instead, on multiple occasions, the DOC reiterated its basic understanding of the Request as seeking illnesses, by type and quantity, at SCI-Fayette compared to the rest of the DOC system, including in: (a) its initial denial of the Request on October 16, 2014 (R. 988a); (b) its appeal letter to the OOR on November 4, 2014 (R. 991a); (c) Oppman's Declaration on November 4, 2014 (R. 993a, ¶3; R. 994a, ¶5); and (d) Oppman's Declaration on January 7, 2015. (R. 1098, ¶3; R. 1099a, ¶6).

D. The DOC's Initial Denial of the Newspaper's Request

As stated above, the DOC's Bureau of Healthcare Services (led by Oppman) was enlisted to spearhead the DOC's response to the Request. (See also R. 1255a:17-22). Despite the language of the Request and the DOC's express understanding of the same as stated *supra*, the DOC determined that its response to the Request should only include, if anything, information previously collected for the unrelated Abolitionist Investigation. (R. 1256a:5-21).

On October 16, 2014, after an extension of time, the DOC denied the Newspaper's Request *in toto*, relying on a laundry list of RTKL exceptions,

including that any documents responsive to the Request were allegedly part of a non-criminal investigation under 65 P.S. §67.708(b)(17). (R. 988a). The DOC did not deny the Request based upon an alleged lack of specificity or purported misunderstanding. (R. 988a-989a; R. 1206a:17-19). In the end, the DOC wished it had a "mulligan" or "do-over" regarding its blanket denial. (R. 1214a:9-12).

III. THE OFFICE OF OPEN RECORDS PROCEEDING

The Newspaper appealed the DOC's total denial of access to the Pennsylvania Office of Open Records (the "OOR"), which resulted in the OOR issuing a Final Determination on December 1, 2014. (R. 996a).

The OOR described the Request as seeking "documentation of illnesses contracted by inmates and/or staff members at SCI-Fayette," including "information comparing the health at SCI-Fayette with the health at other state correctional facilities . . . ." (R. 996a-997a). The OOR overruled the DOC's defenses and held that: "Requester's appeal is granted and the Department is **required to provide all responsive records** to the Requester within thirty days." (R. 1004a) (emphasis added). The Final Determination did not mention the Abolitionist Report. (See R. 996a, generally; see also R. 1209a:23-1210a:4).

IV. THE DOC'S EVENTUAL PRODUCTION OF DOCUMENTS

In the months after issuance of the Final Determination, the DOC finally produced *some* information to the Newspaper in response to the Request. All of

the information released initially by the DOC was collected during, and for the purposes of, the DOC's Abolitionist Investigation. (R: 1210a:5-13, R. 1211a:1-6).[6]

The DOC agreed that "*all* the information" in some of its information repositories, including the Chronic Care Clinics, Mortality Lists, and Oncology Database was, at the very least, responsive to the Request and "should have been produced." (R. 1179a:23-1180a:15) (emphasis added). The DOC, however, did not produce most of this information until the Newspaper instituted its enforcement action and used the discovery process to reveal the mass of information responsive to the Request, but withheld by the DOC. The DOC produced documents from its Abolitionist Investigation, but forced the Newspaper to litigate specifically and expensively for every piece of responsive information thereafter.

A. Chronic Care Clinics and the DOC's P-Trax Database

The DOC maintains a number of inmate medical groupings, called "Chronic Care Clinics," related to a variety of disease categories. (R. 764a, ¶1). Patients are tracked within each Chronic Care Clinic via an electronic database, called "P-Trax." (R. 764a, ¶3). With P-Trax, the DOC could compare the number of inmates suffering from a disease at one facility with the total number of inmates afflicted across all institutions. (R. 1162a:16-23, R. 1185a:4-25).

[6] Prior to trial, and at the Commonwealth Court's request, the parties submitted Stipulations detailing the information provided by the DOC and the timeline of the same. (See R. 760a).

P-Trax is a "live" database, meaning that only present-day data, not historical data, can be generated. (R. 765, ¶7). In other words, P-Trax changes on a daily basis depending on the movement of inmates and other factors. (R. 1187a:14-1188a:1). The DOC did not capture all of the data as it existed in P-Trax on the date of the Request, September 25, 2014, or any day thereafter, which resulted in the irreversible loss of such data. (R. 765a, ¶¶8, 13).

Initially, following the OOR Final Determination, the DOC produced a chart from P-Trax identifying the number of inmates enrolled in a single Chronic Care Clinic, related to pulmonary diseases, which was prepared for the Abolitionist Investigation. (R. 765a, ¶10). The DOC did not, however, provide full information from all of the Chronic Care Clinics or P-Trax in response to the Newspaper's Request. (R. 765a, ¶¶11, 12). In fact, no one at the DOC suggested looking into P-Trax to respond to the Newspaper's Request until the Newspaper raised the issue in discovery in the enforcement action. (R. 1234a:7-13).

B. <u>The DOC's Oncology Database</u>

The DOC maintains an "Oncology Database" (R. 766a, ¶14), which is "an extensive database of all current cancer patients in state prison facilities." (R. 1089a). Reports from the Oncology Database can be generated to detail, for example, the number of inmates suffering from cancer at one DOC facility and across all facilities. (R. 766a, ¶¶15, 18; R. 1165a:8-1166a:13).

On January 6 and 7, 2015, following the OOR Final Determination, the DOC produced two summary charts from the Abolitionist Investigation regarding the number of cancer patients. (R. 766a, ¶19). During discovery in the enforcement action, two years later on March 3, 2017, the DOC produced more responsive information from the Oncology Database. (R. 766a, ¶20). As the DOC expressly confirmed: "The oncology database entirely was never produced . . . until discovery in this case." (R. 1222a:19-23).

C. The DOC's Mortality Lists

The DOC has "Mortality Lists" tracking inmate deaths. (R. 767a, ¶32). The DOC could compare the number of inmate deaths at one facility with the number of deaths across all institutions. (R. 1164:7-15). The Mortality Lists not only reflect the number of deaths, but also cause of death. (R. 1164a:16-23).

On December 31, 2014, following the OOR Final Determination, the DOC produced two summary charts specifically regarding only natural and cancer deaths. (R. 768a, ¶38). In response to discovery in the enforcement action, on March 3, 2017 the DOC produced a full printout of the Mortality Lists, which contained *more* responsive information. (R. 768a, ¶39).

D. Reports from the DOC's Pharmacy Contractor

The DOC outsources many of its healthcare functions to third-party contractors, including pharmacy functions to Diamond Pharmacies. (R. 768a,

¶¶40, 41). Previously, during the Abolitionist Investigation, the DOC requested, and Diamond Pharmacies provided, charts comparing the number of patients being treated for respiratory and gastrointestinal diseases based upon the medications that the inmates were prescribed. (R. 768a, ¶42). However, in response to the Request, the DOC did not contact Diamond Pharmacies for reports regarding other diseases. (R. 1243a:6-16). The DOC only communicated with Diamond Pharmacies well after the filing of the enforcement action. (R. 1243a:17-1244a:3).[7]

V. THE NEWSPAPER INSTITUTES ITS ENFORCEMENT ACTION IN COMMONWEALTH COURT

After the DOC continually refused to produce all responsive records, as mandated by the OOR Final Determination, the Newspaper instituted litigation in the Commonwealth Court via its Petition for Review and Enforcement of Final Determination of Office of Open Records on February 6, 2015. (See R. 1a).

The Newspaper litigated its enforcement action for years in order to uncover, initially, what relevant information the DOC had at its ready disposal, then to determine the pervasiveness of the DOC's failure to respond appropriately to the Newspaper's Request from the outset and the DOC's continued refusal to comply fully with the OOR Final Determination. Throughout the enforcement action the Commonwealth Court issued a number of important rulings.

[7] Maintenance of the repositories by third-party healthcare vendors does not insulate the DOC from production. 65 P.S. §67.506(d)(1).

First, Judge Simpson issued his Opinion on December 16, 2016 regarding the parties' cross-motions for summary judgment. ("Summary Judgment Opinion," Exhibit C to DOC Brief).[8] Within this Opinion, the Commonwealth Court determined that the DOC failed to produce "all responsive records" in response to the Request and as stated in the OOR Final Determination. The lower court also identified specific documents subject to the OOR's disclosure directives. (Summary Judgment Opinion, at 12-13, 15-16; see also 12/19/16 Order). Further litigation was necessary to determine the full scope of the DOC's denial of access.

Second, following trial, the Commonwealth Court issued an Opinion on March 23, 2018 detailing the numerous instances of the DOC's bad faith, including: (a) the DOC did not make a good faith effort to determine whether it had responsive records to the Newspaper's Request ("Bad Faith Opinion," Exhibit B to DOC Brief, at 17-18);[9] (b) the DOC did not even review potentially responsive records before litigating its defenses before the OOR (id. at 19-20); (c) the DOC did not produce responsive records in a timely manner following the OOR Final Determination (id. at 20-21); (d) even when the Commonwealth Court identified particular records as responsive, the DOC refused to produce them (id. at

[8] The Summary Judgment Opinion was later published and reported. See Uniontown Newspapers, Inc. v. Pa. Dep't of Corr., 151 A.3d 1196 (Pa. Commw. Ct. 2016).

[9] The Bad Faith Opinion was later published and reported. See Uniontown Newspapers, Inc. v. Pa. Dep't of Corr., 185 A.3d 1161 (Pa. Commw. Ct. 2018).

20-21); and (e) the DOC's failure to search properly for responsive records and preserve the same led to the loss of relevant information. (Id. at 18-19, 21-22).

Third, Judge Simpson also issued an Opinion on October 29, 2018 shifting approximately half of the Newspaper's legal fees incurred in the enforcement action, around $118,000, to the DOC under the fee shifting and sanctions provisions of the RTKL. ("Fee Shifting Opinion," Exhibit A to DOC Brief).[10]

VI. THE DOC'S PROCEDURES RELATED TO RTKL REQUESTS

During the enforcement action, the Newspaper sought discovery on the DOC's RTKL procedures, or lack of appropriate RTKL framework. The DOC, for example, does not have any training program and does not circulate training manuals regarding how to handle RTKL requests. (R. 1204a:6-12). Even Filkosky, the DOC's AORO, was not provided with any training despite being tasked with handling over 15,000 RTKL requests. (R. 1251a:20-1252a:11).

The DOC has some general written procedures in-place. (See R. 954a). Pursuant to these procedures, for example, the following obligations are stated:

> If the request is sufficiently specific, the [Records Legal Liaison (RLL)] and [Agency Open Records Officer (AORO)] should proceed to determine the likely records custodians and send an internal email, with the RTKL request attached, to the person(s) within the agency believed to have the responsive records. The RLL should include appropriate instructions and a deadline for

[10] The Fee Shifting Opinion was later published and reported. See Uniontown Newspapers, Inc. v. Pa. Dep't of Corr., 197 A.3d 825 (Pa. Commw. Ct. 2018).

> providing any responsive records to the legal office for review.

(R. 954a, at ¶7). For the Request, no such e-mail with "appropriate instructions" was sent to the Bureau of Healthcare Services or anyone else. (R. 1207a:4-8). In fact, all that the AORO, Filkosky, did in response to the Newspaper's Request was forward the Request as-is to the DOC's Bureau of Healthcare Services:

> Q: And in this case, is there any written documentation of what records you asked to be searched and maintained in connection with The Herald Standard's Right-to-Know request?
>
> A: No. I just forwarded the actual request.
>
> Q: And that was the sum and substance of what you did in this case, correct?
>
> A: Yes.

(R. 1267a:6-17). The AORO did not ask for an explanation regarding the Abolitionist Investigation or how it related to the substance of the Request, did not actually review the Request with the Bureau of Healthcare Services, did not question the Bureau of Healthcare Services' narrow interpretation of the Request, and did not take any steps to confirm the accuracy of the Bureau of Healthcare Services' position or alleged lack of responsive records. (R. 1263a:4-1265a:3).

Also pursuant to the DOC's RTKL procedures, a litigation hold is required to be placed on all *potentially responsive* records to avoid destruction. (R. 954a, at ¶8; R. 1208a:3-6). In response to the Request, Oppman and the Bureau of

Healthcare Services never received a hold instruction. (R. 1174a:20-1175a:8). Additionally, in-house counsel for the DOC was not aware of any hold. (R. 1208a:7-10). Ensuring the preservation of the full universe of potentially responsive documents is not only important to respond fully to a RTKL request as an initial matter, but also to address potential appeals, including instances where a request is originally denied and the denial is overturned (like this case). (R. 1266a:11-21).

SUMMARY OF THE ARGUMENT

Appellant, DOC, ignored its most basic duties under the Pennsylvania RTKL. Instead of receiving a RTKL Request from the Newspaper targeted at a potential health crisis in Fayette County, giving due consideration to the nature and scope of the request, performing a good faith search for documents potentially responsive to the Request, and determining whether these records were public and subject to disclosure, the DOC blocked access *ab initio*. In fact, the DOC did not perform *any* search for responsive records, and denied the Request multiple times without even understanding what responsive information it had. The DOC used its eventual disclosures to the Newspaper's Request after the Office of Open Records directed the DOC to produce "all responsive records" as a chance to tout the results of an unrelated internal investigation into claims made by non-profit activist groups. The DOC's conduct is improper and in bad faith, and must be sanctioned.

First, the DOC's leading issue misinterprets the Commonwealth Court's decision. The Commonwealth Court did not hold that a specific individual at the DOC must personally perform certain duties under the RTKL, including a search for responsive records. Instead, the Commonwealth Court held that the DOC *as an agency* failed to perform any search, among other instances of bad faith.

Second, the Commonwealth Court appropriately held that Section 1304(a) of the RTKL applies to instances where the decision of a government agency is

reversed and the agency acted in bad faith. The DOC's restrictive reading of Section 1304(a) to apply to two narrow procedural circumstances is counter to the language, intent, history, and framework of the RTKL. Moreover, the DOC's position creates a disincentive for requestors to prevail during the RTKL administrative process. Sanctions under the RTKL should turn on whether the agency acted in bad faith, not whether the procedural stars align perfectly.

Third, the DOC acted in bad faith in a number of respects, including by interpreting the Newspaper's Request in a narrow and self-serving manner, failing to search for responsive records, litigating its defenses without evaluating the universe of responsive records, failing to preserve responsive information, continually blocking access, and lacking a proper RTKL response framework.

Fourth, in the alternative, even if the Court determines that fee shifting under the RTKL is not appropriate, the Commonwealth Court's fee shifting decision can be affirmed under Section 2503 of the Judicial Code because the DOC acted in bad faith during the pendency of the Newspaper's enforcement action. Most glaring, even when the Commonwealth Court stated specifically in its Summary Judgment Opinion which records were responsive to the Newspaper's Request, the DOC continued to deny access, prolonging the legal proceedings.

ARGUMENT

I. THERE IS NO DISPUTE THAT AN AGENCY HAS A GOOD FAITH DUTY TO SEARCH FOR DOCUMENTS RESPONSIVE TO A RTKL REQUEST, AND THE DOC FAILED TO FULFILL SUCH A DUTY

The DOC's primary question on appeal misconstrues Judge Simpson's well-reasoned opinion. Judge Simpson did *not* sanction the DOC because a single individual, even the AORO, failed to perform a search for responsive documents. Instead, he sanctioned the DOC as an organization because *no one* performed such a requisite, good faith search. Judge Simpson appropriately placed the search burden on the agency as a whole, and included among the list of DOC's incidents of bad faith the failures of the AORO. This Court should refrain from offering what would become an advisory opinion on the DOC's wholly hypothetical first issue. See Burke v. Indep. Blue Cross, 103 A.3d 1267, 1271 (Pa. 2014) (collecting cases) ("Pennsylvania courts do not issue purely advisory opinions.").

A. The RTKL Requires the DOC to Make a Good Faith Search

There is no dispute that the DOC had a duty to make at least a "good faith," reasonable inquiry for documents responsive to the Newspaper's Request. See 65 P.S. §67.901. The DOC admits that "Section 901 of the RTKL imposes ***on the agency*** a duty to act in good faith." (DOC Brief, at 15) (emphasis original). The DOC further admits that its duties include "performing an independent record search, physically obtaining records, reviewing them and assessing their

content . . . ." (Id. at 17). Therefore, the DOC has conceded that someone at the agency must perform a "good faith" and "independent" search for documents in response to every RTKL request. Despite this admission, the DOC cites no evidence reflecting that it satisfied its obligation to do so in response to the Newspaper's Request.

The case law interpreting the RTKL is equally clear – someone at the agency must search for documents responsive to a request. See, e.g., Shuler v. Pa. Dep't of Corr., No. 237 C.D. 2016, 2016 WL 6441187, at *3 (Pa. Commw. Ct. Nov. 1, 2016) (holding in another RTKL case against the DOC: "agency is required to search its records in good faith, and determine whether responsive records are public or not."); Dep't of Labor & Indus. v. Earley, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015) ("an agency bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist."). Many times, the AORO is naturally in the best position as the RTKL designee for the government agency to perform, or at least oversee and coordinate, the search efforts. See 65 P.S. §67.502 (Open-records officer).

B. Judge Simpson Held that the DOC as an Agency Failed to Search

Judge Simpson's Bad Faith Opinion (DOC Brief, Exhibit B), although identifying individual actors and their accompanying failings, clearly evaluated the DOC's response to the Newspaper's Request *as an agency overall*. In fact, Judge

Simpson appropriately held: "*DOC* did not make a good faith effort to determine whether *it* had possession or control of responsive records upon receipt of the Request. *Critically, it did not perform any search for records in response to the Request.*" (Bad Faith Opinion, at 17) (emphasis added). The Commonwealth Court directed this failure to the DOC as an agency, and the DOC has not cited, because none, evidence of record to the contrary.

The Commonwealth Court opened its discussion of the good faith search duty with a discussion of "an *agency's* mandatory duties during the request stage." (Bad Faith Opinion, at 16) (emphasis added). Judge Simpson went on to discuss the administrative duties specifically assigned to the AORO, including coordination with document custodians. (Id. at 17). Nowhere in the opinion does Judge Simpson state that the AORO must personally search for responsive documents or cannot enlist the assistance of colleagues. Instead, the AORO remains the central person charged with coordinating the overall RKTL response.

The relevant portion of the Commonwealth Court's Bad Faith Opinion continues to catalogue the ways in which the DOC as an entity failed:

- "After obtaining all potentially responsive records, an *agency* has the duty to review the records and assess their public nature under Sections 901 and 903 of the RTKL." (Bad Faith Opinion, at 17) (emphasis added).

- "It is axiomatic that an *agency* cannot discern whether a record is public or exempt without first obtaining and reviewing the record." (Id.) (emphasis added).

- "*DOC's* failure to search records in its possession for responsive records during the request stage constitutes bad faith." (Id. at 18) (emphasis added).

- "*DOC* did not learn about responsive records until well into the litigation. An *agency's* failure to locate responsive records until motivated by litigation evinces bad faith, meriting consideration by a fact -finder." (Id.) (emphasis added).

- "*DOC* breached its duty to obtain all potentially responsive records from its Health Care Bureau and all other records custodians upon receipt of the Request." (Id.) (emphasis added).

- "*DOC* did not attempt to discern what records purportedly related to the No Escape Investigation until the appeal stage. *DOC* did not document the sources of potentially responsive records, such as the four Inmate Illness Sources." (Id.) (emphasis added).

- "As a result, *DOC* was unaware what records its Health Care Bureau deemed responsive, and yet investigative." (Id.) (emphasis added).

- "Without obtaining or reviewing any records, *DOC* denied access to responsive public records. *DOC's* failure to comply with Section 901 prior to issuing its 'denial' under Section 903 constitutes bad faith." (Id.) (emphasis added).

- "*DOC* also did not preserve all potentially responsive records during the request stage." (Id.) (emphasis added).

- "Further, there is no evidence that *DOC* reviewed potentially responsive records before litigating their investigative nature before OOR." (Id. at 19) (emphasis added).

- "*DOC's* submissions to OOR representing that records were exempt, without reviewing the records, is not sustainable. At a minimum, during the appeal stage, *DOC* should have assessed what potentially responsive records were kept where, and reviewed those records before submitting verifications to OOR attesting to their content or completeness. By contesting access during the appeal, without obtaining all records and assessing the records' public nature, *DOC* acted in bad faith." (Id. at 20) (emphasis added).

The impetus for a finding of bad faith by the Commonwealth Court was not that a particular individual, even the AORO, failed to perform a good faith search for responsive records, *but it was that no one at the DOC performed such a search.* The DOC's leading criticism of Judge Simpson's ruling is, accordingly, misplaced.

C. The Record Supports the DOC's Lack of Search

The DOC has not cited to a single piece of evidence in the record to challenge Judge Simpson's factual findings regarding the agency's global failure to conduct a good faith search for responsive records to the Request, nor could it. The record fully supports the Commonwealth Court's conclusions.

The Newspaper's Request was originally received by Filkosky, the DOC AORO. (R. 1252a:17-22). The AORO understood that the Newspaper had not asked for the results of the DOC's separate Investigation into the Abolitionist Report. (R. 1268a:18-20). Nonetheless, the AORO "got the impression that other than the investigation, the only records that would exist would be inmates' medical records." (R. 1256a:23-1257a:1-3). The AORO did nothing to confirm this "impression." (R. 1263a:14-1264a:19). In reality, aside from some overlap in subject-matter and coincidental timing, the Newspaper's Request and the Abolitionist Report were not aligned, and certainly were not the same. (See, e.g., Counter-Statement of the Case, supra, at Sect. II(C)).

Filkosky forwarded the Request to the Bureau of Healthcare Services, but performed no search for responsive documents himself. (R. 1267a:10-17). Oppman, formerly Director of the Bureau of Healthcare Services at the DOC, was the "go-to person for anything having to do with medical care at the DOC." (R. 1156a:10-12, 1157a:5-13). Oppman led the DOC's response to the Request, and was best suited to do so. (R.1169a:22-1170a:8). Ultimately, without support, the DOC lumped the Newspaper's Request into the same substantive bucket as the DOC's Investigation into the Abolitionist Report. (R. 1171a:20-24). Oppman was instructed by DOC counsel to pull information from the Abolitionist Investigation in response to the Request, (R. 1175a:14-20), and simply planned to "repackage" some information from the Abolitionist Investigation. (R. 1179a:14-17). All along the DOC blindly "assumed" that the Newspaper was "looking for" the results of the Investigation, (R. 1179a:3-6), and the DOC's focus remained on responding to and rebutting the Abolitionist Report, not complying with the RTKL. (R. 1174a:17-19). The Abolitionist Investigation, of course, was not launched to search for documents responsive to the Newspaper's Request. (R. 1161a:17-19).

All of the documents eventually released to the Newspaper prior to this enforcement action came solely from the DOC's Abolitionist Investigation. (R. 1176a:5-14). Oppman, who was, along with his team, "in the best position to

determine the universe of responsive documents" to the Request (R. 1178a:15-20), admitted that he certainly did not make any independent search for documents:

> Q: And aside from gathering documents from that investigation, you didn't perform any – any search for other documents in response to the newspaper's request, right?
>
> A: No . . . .

(R. 1177a:22-25). He was not aware of *anyone* who searched. (R. 1179a:7-13).

In the end, the DOC purportedly "already knew what it had" by virtue of its Abolitionist Investigation. (R. 1212a:18-22).[11] There is no exception in the RTKL to the good faith search requirement merely because an agency thinks it knows what it has already. Nor should there be – if an agency was permitted to avoid its most basic RTKL obligations unilaterally, opportunities for mischief abound.

A good faith search for responsive records remains a threshold, indispensable step in the RTKL response process. See Pa. State Police v. McGill, 83 A.3d 476, 481 (Pa. Commw. Ct. 2014) (RTKL "does not permit an agency to avoid disclosing existing public records by claiming, in the absence of a detailed search, that it does not know where the documents are."). The lack of good faith inquiry, and necessity of a good faith search for records in response to every RTKL

[11] The DOC vaguely references another government employee, Ms. Montag, who was purportedly "familiar with the records" responsive to the Newspaper's Request, but the DOC readily admits that there is no evidence of record regarding what Ms. Montag did with the Request or in response to the Request, let alone enough evidence to conclude that the DOC performed a requisite, good faith search for responsive records. (DOC Brief, at 17 & n. 2).

request, are further exemplified by the outcome of the litigation – after years of litigation and discovery, the Newspaper uncovered many documents responsive to its Request that were withheld (or never even discovered independently) by the DOC. Plainly, the DOC did not already know what it had, and this case makes manifest why such a good faith search rule is necessary for each and every request under the RTKL, especially considering the statute's underlying presumption of public access to public records. See 65 P.S. §67.305(a) (presumption).

D. The Newspaper's Request was Specific and Clear

Despite the record proving the opposite, the DOC continues to claim that the Newspaper's Request was "confusing and unclear" and suffered from a "lack of clarity . . . ." (DOC Brief, at 16). The DOC, however, did not deny the Request based upon an alleged lack of specificity or misunderstanding. (R. 1206a:17-19).

At trial, the DOC's AORO readily admitted he understood that the Newspaper had not asked for the results of the DOC's Investigation into the Abolitionist Report. (R. 1268a:18-20). A reading of the scope of the Abolitionist Report compared to the Newspaper's Request expressly confirms their obvious divergence. (See also Counter-Statement of the Case, supra, at Sect. II(C)).

When discussing the DOC's response to the Request in early 2015, the Newspaper specifically advised the DOC that its Request was not merely seeking information regarding the Abolitionist Investigation/Abolitionist Report.

(R. 1094a-1095a; see also R. 1212a:13-17). In response, the DOC, through its in-house counsel, confirmed: "I understand. We do not have any such records that are that specific beyond going through every medical record, which is not required." (R. 1094a).[12] The DOC somehow confirmed in response to the Newspaper's message that all responsive records were contained within the results of the preexisting and separate Abolitionist Investigation, even though no one at the DOC searched for responsive records.[13]

Moreover, on multiple occasions, the DOC reiterated its basic understanding of the Request (which was different from the Abolitionist Report and the Abolitionist Investigation) as seeking illnesses, by type and quantity, at SCI-Fayette compared to the rest of the DOC system, including in: (a) its initial denial of the Request (R. 988a); (b) its appeal letter to the OOR (R. 991a); (c) Oppman's Declaration on November 4, 2014 (R. 993a, ¶3; R. 994a, ¶ 5); and (d) Oppman's Declaration on January 7, 2015. (R. 1098a, ¶3; R. 1099a, ¶6).

In the end, the DOC interpreted the Newspaper's Request in a self-serving manner in order to provide the DOC with a platform to publicize the results of the

[12] This response highlights again the mischief that prevails when an agency does no search for responsive records, but instead relies on its "familiarity" with its documents.

[13] This is an example of Judge Simpson's attempts to give the DOC the benefit of all doubts before imposing sanctions. The Commonwealth Court held that the "DOC had no apparent basis, other than coincidental timing, for assuming the Request sought only records related to the No Escape [Abolitionist Report] Investigation." Judge Simpson determined, however, despite this impropriety that this failing alone did not rise to bad faith. (Bad Faith Opinion, at 15-16).

Abolitionist Investigation, which purportedly debunked the damaging Abolitionist Report. The DOC did not care about responding fully, or at all, to the Newspaper's Request, but used the Request as a public relations opportunity.

E. Burden is Not a Defense to the DOC's RTKL Obligations

The DOC continually admits throughout its brief that someone at the agency must search in good faith for responsive documents: "To be clear, the Department emphasizes that what is key here is not whether a requestor is entitled to receive this assessment [of whether responsive records exist]; *it certainly is*." (DOC Brief, at 18) (emphasis added). The DOC, instead, asks this Court for guidance as to who within the agency must perform the search, while further agreeing that "an AORO *could* perform these functions . . . ." (Id.) (emphasis original).

The DOC goes on, however, to cite to a number of "administrative problems" that could arise if the AORO or other specific individual were required to personally perform the search. (DOC Brief, at 18-20). The DOC's underlying position, and that of the *Amici* in support of the DOC,[14] is clear – it is too burdensome and difficult for the agency to respond to open records request under the RTKL as written. (See, e.g., Amicus Brief, at 8-15 (advocating for an early denial without a records review, and elevating efficiency over an actual document review); 24-27 (complaining of "undue burden" on the government)). This

[14] The County Commissions Association of Pennsylvania, Pennsylvania State Association of Township Supervisors, Pennsylvania School Boards Association, and Pennsylvania Municipal Authorities Association filed an Amicus Brief in support of the DOC's position.

position, however, has been rejected. See, e.g., Borough of W. Easton v. Mezzacappa, 74 A.3d 417, 420 (Pa. Commw. Ct. 2013) (rejecting defenses by borough based on alleged unreasonable burden due to small, part-time staff).

"There is simply nothing in the RTKL that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so." Commw. Dep't of Envtl. Prot. v. Legere, 50 A.3d 260, 266 (Pa. Commw. Ct. 2012). See also Carey v. Pa. Dep't of Corr., 61 A.3d 367, 372-73 (Pa. Commw. Ct. 2013) ("a burden on an agency attendant to gathering responsive records does not pertain to sufficiency of a request or render it non-specific."). The DOC admits that burden is not a defense. (DOC Brief, at 19 n. 5).

The DOC, a government entity funded wholly by public funds and entrusted with the lives of thousands of citizens, owes a bedrock duty of openness to the citizens of the Commonwealth of Pennsylvania. Transparency is not optional, and the DOC cannot discard its obligations because keeping the public informed would be "too difficult" or create "administrative problems." Much of the DOC's alleged burden is likely self-imposed because it lacks any RTKL training regime, and even the general written procedures it drafted (with the initial step of drafting procedures inuring to its credit) were largely ignored in this case by the agency's employees. (See, e.g., Counter-Statement of the Case, supra, at Sect. VI).

This is also not the first time the DOC has run afoul of its RTKL obligations. See, e.g., DOC v. St. Hilaire, 128 A.3d 859, 865 (Pa. Commw. Ct. 2015) (affirming OOR final determination requiring DOC to disclose records, and holding that DOC's claim of burden was unfounded, especially considering burden was due to lack of organization); Carey v. DOC, No. 1348 C.D. 2012, 2013 WL 3357733, at *5 (Pa. Commw. Ct. July 3, 2013) (holding that the DOC failed to produce responsive records); Carey, 61 A.3d at 372 (rejecting another claim of burden by the DOC in response to a RTKL request); Buehl v. DOC, 955 A.2d 488, 494 (Pa. Commw. Ct. 2008) (rejecting DOC's speculative assertion of exemption).

If the DOC believes that the RTKL requires a legislative overhaul, it should pursue reform with the General Assembly, not ignore its clear RTKL duties, block access to requestors in bad faith without searching for responsive records, and force requestors to spend hundreds of thousands of dollars to fight for access.

II. THE RTKL AUTHORIZES FEE SHIFTING FOR THIS CASE

Section 1304(a) of the RTKL, which permits a requestor to obtain fees when, *inter alia*, the responding agency acts in bad faith, applies to this case. Absent application of Section 1304(a), the DOC's bad faith refusal to search for documents responsive to the Newspaper's Request (see Sect. I(B)-(C), supra), and other manipulations of the RTKL process (see Sect. III, infra), remain unchecked

merely because the Newspaper won at the OOR. Judge Simpson's interpretation of the statute should be affirmed. (See Fee Shifting Opinion, at 5-11).

A. The RTKL Authorizes Fee Shifting in this Case

The RTKL permits a requestor to collect attorneys' fees:

> **(a) Reversal of agency determination.** If a court reverses the final determination of the appeals officer or grants access to a record after a request for access was deemed denied, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester if the court finds either of the following:
>
> (1) the agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or
>
> (2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.

65 P.S. §67.1304(a). The DOC argues that "Section 1304(a) of the RTLK [sic] clearly limits court costs and fees imposed to two instances -- reversal of the appeals officer or grant of a deemed denial." (DOC Brief, at 22). Not so.

To begin, the heading of Section 1304(a), "reversal of an agency decision," clarifies that the provision should apply any time an agency (*i.e.*, the DOC) has its decision to deny access reversed. 1 PA. CONS. STAT. ANN. §1924 ("The title and preamble of a statute may be considered in the construction thereof."); Wiley v. Umbel, 49 A.2d 371, 373 n.1 (Pa. 1946) (headings may be used in aid of

construction of statutes). Here, that is precisely what happened – the OOR reversed the DOC's blanket decision to deny access to the Newspaper and the Commonwealth Court agreed with the OOR. The trigger for sanctions under the RTKL should be the impropriety of the agency's actions, not some narrow procedural posture dependent on the outcome of the OOR proceedings.

Next, Section 1304(a) makes multiple references to a "final determination." *First*, in its opening line, the statute references "the final determination of the appeals officer . . . ." An "appeals officer" is the individual at the OOR reviewing RTKL appeals at the administrative level. See 65 P.S. §67.102 (general definition of "appeals officer"); §67.503 (further defining the term); §67.1102 (discussing the duties and procedures of an appeals officer). *Second*, in subsection (a)(2), the statute discusses the "final determination" of "the agency . . . ." An "agency" under the RTKL includes a Commonwealth agency, such as the DOC. 65 P.S. §67.102. This multifaceted use of "final determination," along with the heading of the subsection, as Judge Simpson aptly observed, interject ambiguity into the statute. If, in accord with the title of the statute, the legislature meant the first use of "final determination" to refer to the final decision of the government agency, this case clearly falls within the confines of Section 1304(a).

Normally, when the words of a statute are clear, the text alone controls. 1 PA. CONS. STAT. ANN. §1921(b); Walker v. Eleby, 842 A.2d 389, 400 (Pa. 2004).

However, when the words of the statute are not sufficiently explicit, the Court may resort to statutory construction techniques, 1 PA. CONS. STAT. ANN. §1921(c), as the Commonwealth Court appropriately did in this case. "When the wording of a statute is not clear on its face, as here, [the Court] must ascertain the intent of the General Assembly in accordance with the Statutory Construction Act." Allegheny Intermediate Unit No. 3 Educ. Ass'n v. Bethel Park Sch. Dist., 680 A.2d 827, 829 (Pa. 1996). See also Narberth Borough v. Lower Merion Twp., 915 A.2d 626, 634 (Pa. 2007) (statutory interpretation principles apply when "the plain language of the statute, standing alone, leaves room for doubt as to its intended meaning."). The Court may consider a wide variety of factors, including, for example:

> the occasion and necessity for the statute or regulation; the circumstances under which it was enacted; the mischief to be remedied; the object to be attained; the former law, if any, including other statutes or regulations upon the same or similar subjects; the consequences of a particular interpretation; and administrative interpretations of such statute.

Commw. v. Giulian, 141 A.3d 1262, 1268 (Pa. 2016).

"The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 PA. CONS. STAT. ANN. §1921(a). This Court has explained that "the objective of the RTKL 'is to empower citizens by affording them access to information concerning the activities of their government.'" Levy v. Senate of Pa., 65 A.3d 361, 381 (Pa. 2013)

(quoting SWB Yankees LLC v. Wintermantel, 45 A.3d 1029, 1042 (Pa. 2012)). Therefore, "courts should liberally construe the RTKL to effectuate its purpose of promoting 'access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.'" Levy, 65 A.3d at 381 (quoting Allegheny County Dept. of Admin. Services v. A Second Chance, Inc., 13 A.3d 1025, 1034 (Pa. Commw. Ct. 2011)). Reserving fees for situations where a court reverses an appeals officer of the OOR, or a court grants access after only a deemed denial, is improperly restrictive and counter to the legislative intent behind the RTKL for at least five reasons.[15]

First, such a restrictive view creates absurd results. If reversal of the OOR was a prerequisite to fees, the RTKL would penalize a requestor for prevailing at the OOR. If the requestor wins at the OOR, and the OOR grants access to records, any reversal by the judiciary would be to the detriment of the requestor. Then, requestors would have an incentive to lose at the OOR level, which would provide a chance for a fees award on a successful appeal to the judiciary. This incentive to lose at the OOR undermines the efficiencies and purpose of an OOR intermediate administrative process from the outset. These results are absurd and improper. 1

[15] More particularly, the Commonwealth Court has described the purpose of Section 1304: "Section 1304 of the RTKL seeks to remedy the damage to the requester where an agency has denied access to records in bad faith . . . ." Office of the Dist. Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1140 (Pa. Commw. Ct. 2017).

PA. CONS. STAT. ANN. §1922(1) ("the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.").

Second, a requestor's ability to seek fees should not hinge on the outcome of the OOR proceedings from the outset. This Court has explained that Section 1304(a) provides no deference to the OOR's findings when fees are sought on appeal. Bowling v. OOR, 75 A.3d 453, 470 (Pa. 2013). Instead, the statute leaves the fee shifting determination strictly to what "the court finds." The judiciary, not the OOR, should have complete control over when to award fees.

Third, the enactment of the RTKL in 2008, which replaced the former Right to Know Act (the "Act"), "was a dramatic *expansion* of the public's access to government documents" and "demonstrate[d] a legislative purpose of expanded government transparency through public access to documents." Levy, 65 A.3d at 381 (emphasis added). The former Act provided a similar fee shifting provision:

> **(a) Reversal of agency determination.** *If a court reverses an agency's final determination*, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester if the court finds either of the following:
>
> (1) the agency willfully or with wanton disregard deprived the requester of access to a public record subject to access under the provisions of this act; or
>
> (2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.

65 P.S. §66.4-1(a) (repealed) (emphasis added). The RTKL carries precisely the same heading as the Act, suggesting they were both intended to apply to the same procedural postures. While similar in many respects, the predecessor statute's framework clearly applied, in its opening line, to any time "a court reverses an agency's final determination . . . ." The RTKL should be read in accord.

While the RTKL bill was with the Pennsylvania Senate, the legislature explained that, although the new RTKL removed the potential for criminal penalties from the former law, it included new, more powerful enforcement provisions, including the ability for requestors to shift fees easier:

> Another criticism of Senate Bill No. 1 is the fact that it removes criminal penalties which have existed since the current law was adopted. This was done because we can find no evidence of a single criminal prosecution under the 1957 law, and because the ACLU and the Attorney General of Pennsylvania agree that criminal sanctions were an inappropriate remedy. *Although Senate Bill No. 1 removes the criminal penalties, it also significantly strengthens civil penalties for noncompliance and makes it easier for a plaintiff to recover attorney fees* ***if an agency acts in bad faith***. I believe these are things that will have a practical, meaningful effect on people's ability to obtain records.

SB 1, PN 1583 – Pa. Legis. J., No. 89, Sess. of 2007, *Bill on Third Consideration and Final Passage*, at 1407 (Pa. 2007) (Sen. Pileggi) (emphasis added).

It is unreasonable to think that the RTKL, which was intended to *expand* the ability of the public to access government records and assert its open records

powers under the Act, would limit its most powerful enforcement provision permitting fee shifting to a narrower set of procedural circumstances. The current RTKL should be construed in accord with its predecessor – the fee shifting provision was intended to combat instances where the ***agency's*** final decision to deny access is reversed and found to be in bad faith. See Giulian, 141 A.3d at 1268 (for statutory interpretation Court can consider, *inter alia*, the former law).

Fourth, there is no explanation why Section 1304(a) would treat deemed denials and express denials differently. Statutory schemes should be construed as a whole. 1 PA. CONS. STAT. ANN. §1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."); Commw. v. Office of Open Records, 103 A.3d 1276, 1285 (Pa. 2014) ("every portion of statutory language is to be read 'together and in conjunction' with the remaining statutory language, 'and construed with reference to the entire statute' as a whole."). Deemed denials generally arise under the RTKL when an agency fails to respond within the five-day deadline following initial receipt of a RTKL request. 65 P.S. §67.901. The RTKL makes no differentiation throughout its entirety as to the treatment of an express denial and a deemed denial. Regardless of how access is denied, the

requestor has the same rights under the RTKL, and the operations of the fee shifting provision should not be read in a way to breach this parity.[16]

Fifth, similarly reading the statute *in pari materia*, all of the RTKL's enforcement provisions should be read together. Section 1305(a) of the RTKL permits a civil penalty of up to $1,500 per day "if an agency denied access to a public record in bad faith." 65 P.S. §67.1305(a). Here, similar to Section 1304(a) under the former Act, this provision applies to anytime a bad faith denial of access occurs. If an agency acts in bad faith in response to a RTKL request, the requestor should have the entirety of the RTKL's enforcement arsenal at its disposal.

Overall, the DOC's attempts to pull the enforcement teeth from the RTKL and confine the possibility of fee shifting to two narrow procedural outcomes runs directly counter to the purpose of the legislature and creates absurd results. Judge Simpson ruled appropriately in construing "Section 1304(a)(1) of the RTKL as permitting recovery of attorney fees when the receiving agency determination is reversed [*i.e.*, just as the title of the subsection reads], and it deprived a requester of access to records in bad faith." (Fee Shifting Opinion, at 10). This construction, as Judge Simpson aptly pointed out:

[16] In the alternative, the DOC's refusal to comply fully with the OOR Final Determination, which directed it to produce all responsive records within thirty days of issuance, could appropriately be considered a deemed denial of access at that stage of the proceedings. The DOC had a statutory, thirty day deadline to comply with or appeal the OOR Final Determination, 65 P.S. §67.1301, but did neither. As Judge Simpson noted, a deemed denial includes a failure to respond within a statutory deadline, (Fee Shifting Opinion, at 5 n.4), which the DOC did here.

> provides an impetus for an agency to comply with an appeals officer's final determination in a requester's favor and provides an incentive to requesters to litigate access and bad faith. Moreover, a fee award holds an agency accountable for its conduct during the RTKL process, as well as for its determination denying access.

(Id.). Judge Simpson's interpretation fits squarely with the purpose and intent of the RTKL and should be affirmed.

B. Absent Fee Shifting Under the RTKL, the Newspaper Lacks Adequate Relief for the DOC's Pre-Enforcement Action Conduct

Absent the ability to seek sanctions under Section 1304(a), much of the untoward conduct combatted by Judge Simpson's sanctions award, and similar conduct in other enforcement or RTKL actions in the future, could escape untouched. Without the fee shifting provision, all that is left to combat the DOC's pre-litigation bad faith is the wrist slap of a $1,500 fine under Section 1305(a).

The DOC argues that "the Judge's analysis misapprehends the law because it ignores the fact that a sanctions remedy already exists for an enforcement proceeding, which is the nature of the case at bar, under Section 2503 of the Judicial Code, 42 Pa. C.S. §2503 (Costs Act)." (DOC Brief, at 23). The DOC, unfortunately, misinterprets Section 2503.[17]

Section 2503 permits fee shifting in various situations, including against:

[17] To the extent that the DOC is suggesting that the Costs Act applies to all of its conduct at issue in this action, including its conduct before the filing of the enforcement action, the Newspaper would certainly acquiesce to an alternative affirmance of the Commonwealth Court's Fee Shifting Opinion on the basis of the Costs Act.

> (7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct *during the pendency of a matter*. . .
>
> (9) Any participant who is awarded counsel fees because the conduct of another party *in commencing the matter or otherwise* was arbitrary, vexatious or in bad faith.

42 PA. CONS. STAT. ANN. §2503 (emphasis added). These provisions have been construed to limit fee shifting for conduct related to the commencement of judicial proceedings, or during the pendency of such proceedings. As the Superior Court, affirmed by this Court, has explained: "Section 2503(7) applies to the conduct of a party in commencing a proceeding or conduct during the pendency of an action. *Section 2503(7), however, does not cover pre-litigation conduct of the parties.*" Sternlicht v. Sternlicht, 822 A.2d 732, 741 (Pa. Super. Ct. 2003), aff'd, 876 A.2d 904 (Pa. 2005) (emphasis added). See also Bucks Cty. Servs., Inc. v. Philadelphia Parking Auth., 71 A.3d 379, 393 (Pa. Commw. Ct. 2013) (accord).

Pennsylvania courts have further held that Section 2503 only applies to traditional judicial proceedings under the Unified Judicial System, not administrative or other quasi-judicial operations such as the underlying OOR proceedings in this case. See, e.g., Indep. Blue Cross v. W.C.A.B. (Frankford Hosp.), 820 A.2d 868, 870 (Pa. Commw. Ct. 2003) (accord regarding the Workers' Compensation Appeal Board); Duquesne Light Co. v. PA PUC, 543 A.2d 196, 201 (Pa. Commw. Ct. 1988) (Public Utility Commission could not award fees under

Section 2503); Commw., Pa. Bd. of Prob. & Parole v. Baker, 474 A.2d 415, 416-17 (Commw. Ct. 1984) (accord regarding the State Civil Service Commission).[18]

Therefore, while Section 2503 appropriately permits sanctions for the DOC's improper conduct *at or after* the filing of the Newspaper's enforcement action in the Commonwealth Court (see also Sect. IV, infra), fee shifting under Section 1304(a) of the RTKL is likely the only sufficient redress to combat the DOC's pre-litigation wrongs and dissuade future, similar manipulations of the RTKL process. Absent application of Section 1304(a) to this case, the DOC's initial offenses, including its most egregious violation of the RTKL in refusing to perform any search for records responsive to the Newspaper's Request, remain completely unchecked. Under the DOC's position, as long as the agency loses at the OOR level, the only real exposure on appeal is an order requiring disclosure of responsive documents and the potential for a $1,500 fine. This creates a disincentive for agencies to comply with the RTKL, and requires requestors to maintain long, expensive appeals without hope of recovering costs.

[18] "OOR is an independent, quasi-judicial tribunal charged with, among other duties, adjudicating appeals of decisions concerning access to records in the possession of Commonwealth and local agencies under the RTKL." Twp. of Worcester v. Office of Open Records, 129 A.3d 44, 49 (Pa. Commw. Ct. 2016).

III. THE DOC ACTED IN BAD FAITH

The DOC next argues that it did not act in bad faith, (see DOC Brief, at 24-31), which is a challenge to the Commonwealth Court's fact-finding.[19] Judge Simpson's factual conclusions, however, were correct and should be affirmed.

The Commonwealth Court has imposed sanctions for bad faith conduct under the RTKL in a variety of contexts. See, e.g., Office of the Dist. Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1140-43 (Pa. Commw. Ct. 2017) (sanctions appropriate for denial based on presumed purpose of request and failure to perform search); Chambersburg Area Sch. Dist. v. Dorsey, 97 A.3d 1281, 1293 (Pa. Commw. Ct. 2014) (remanding to trial court to determine whether good faith search was made); Newspaper Holdings, Inc. v. New Castle Area Sch. Dist., 911 A.2d 644, 650 (Pa. Commw. Ct. 2006) (improperly withholding public documents to further school district's public relations agenda warrants fee shifting).

At trial, the DOC AORO directly admitted that the agency botched its response to the Newspaper's Request. When asked whether he would want a "do-over" regarding the DOC's response, including the initial agency declaration submitted to the Newspaper, the AORO admitted: "I've wished for many mulligans in my life, and this would be one of them." (R. 1214a:9-12). When further questioned about the DOC's failure to provide all responsive documents,

[19] As stated in the Newspaper's Statement of the Standard and Scope of Review, Judge Simpson's factual conclusions are protected by an abuse of discretion standard.

the DOC's AORO agreed that the Newspaper made "pretty good points" related to the DOC's various failures in response to the Request. (R. 1216a:17).

A. The Commonwealth Court's Bad Faith Conclusions

Judge Simpson determined that the DOC's bad faith included: (a) the DOC did not make a good faith effort to determine whether it had responsive records (Bad Faith Opinion, at 17-18); (b) the DOC did not even review potentially responsive records before litigating its defenses at the OOR (id. at 19-20); (c) the DOC did not produce responsive records in a timely manner following the OOR Final Determination (id. at 20-21); (d) even when the Commonwealth Court identified records particularly responsive to the Request, the DOC refused to comply (id. at 20-21); and (e) the DOC's failure to properly search for responsive records and preserve the same led to the irretrievable loss of relevant information. (Id. at 18-19, 21-22). All of these conclusions are well-supported in the record, and the DOC does not appear to challenge the factual predicate for the same.

In its brief, the DOC only addresses two instances of potential bad faith, even though numerous instances exist. *First*, the DOC argues that the AORO, among others, did not act in bad faith because these individuals appropriately processed the Newspaper's Request. (See DOC Brief, at 25-28). The DOC ignores that no one at the DOC performed a good faith search for records responsive to the Request. (See Sect. I, supra.). *Second*, the DOC argues that it

was not required to produce anything in response to the Commonwealth Court's Summary Judgment Opinion because Judge Simpson did not explicitly add a directive to produce. (See DOC Brief, at 28-31). This position is equally debunked because the DOC ignores that it was always under a duty to produce records pursuant to the OOR Final Determination. (See Sect. IV, infra).

There is no better exemplar case for the judiciary to permit the full arsenal of fees and other sanctions under the RTKL to be released. The DOC denied the Newspaper's Request and litigated its blanket assertion of exemptions to disclosure under the RTKL without performing any good faith search to determine which documents or information were responsive to the Request from the outset. The DOC's "fire now and aim later" approach to open records requests violates the most basic requirements and safeguards under the RTKL. The RTKL presumes openness, while the DOC's position advocates for stonewalling. Next, when the DOC lost at the OOR, and the OOR issued its Final Determination, the DOC did not appeal. Instead, it simply refused to comply. Later, after repeated attempts to compel compliance voluntarily, the Newspaper was forced to file its enforcement action in Commonwealth Court and litigate for years. Even then, after the Commonwealth Court told the DOC precisely the documents encompassed within the Request and the OOR's Final Determination, additional litigation was necessary to obtain the responsive information from the DOC.

Judge Simpson perfectly encapsulated the case and necessity of sanctions:

> Enforcement proceedings should not be necessary to ensure an agency's compliance with its statutory duties. DOC's delay in complying with the Disclosure Order was unreasonable. Once this Court issued the Summary Relief Opinion, there was no excuse for further delay. Yet, DOC forced Requester to expend time and resources to discern what responsive records remained undisclosed. Under these circumstances, DOC's persistent denial of access constitutes bad faith.

(Bad Faith Opinion, at 22). The DOC's denial of access was willful, pervasive, and spanned over a course of years. Sanctions remain appropriate and necessary.

B. <u>The DOC Engaged In Other Bad Faith</u>

In addition to the instances of bad faith found by the Commonwealth Court, there were other occasions of bad faith by the DOC.

First, for example, the DOC interpreted the Newspaper's Request in an overly narrow, self-serving manner. As Judge Simpson explained: "A party's construction of a request such that there are no responsive records, other than those that are clearly protected, is improper." (Summary Judgment Opinion, at 9; <u>see also id.</u> at 17) (citing <u>Carey</u>, No. 1348 C.D. 2012, 2013 WL 3357733; <u>Carey</u>, 61 A.3d 367, 370; <u>Shuler v. Pa. Dep't of Corr.</u>, No. 237 C.D. 2016, 2016 WL 6441187 (Pa. Commw. Ct. Nov. 1, 2016)). As stated, despite a lack of real connection between the Abolitionist Report and the Newspaper's Request, the DOC simply planned to repackage the results of its Abolitionist Investigation and

"assumed" that this was the information the Newspaper wanted. The DOC's construction of the Request was further improper because the DOC ultimately used the RTKL process as a vehicle to publicize the positive results of its Abolitionist Investigation, rather than collect, review, and produce all responsive records in accordance with its legal duties. See Newspaper Holdings, Inc., 911 A.2d 644 (imposing sanctions when school district denied access to settlement with students in bad faith and used purported confidentiality as a means to "pursue its own agenda" and keep the public in the dark).

Second, the DOC processed the Newspaper's Request through individuals untrained in the RTKL, who were not knowledgeable in even the DOC's internal RTKL procedures. This includes the DOC's AORO who, despite handling over 15,000 RTKL requests, had no training whatsoever. See 65 P.S. §67.1310(a)(3)-(4) (OOR was established to, *inter alia*, provide training to willing officials).

Third, to the extent that the DOC had any actual RTKL procedures in place, the DOC violated the same because, for example, the AORO never issued "appropriate instructions" to the Bureau of Healthcare Services to guide its response to the Request. (See R. 954a, ¶7). In fact, the AORO merely forwarded the Request down the line. (R. 1267a:6-17). In further violation of its own procedures, the DOC did not issue a litigation hold, (see R. 954a, ¶7), or take any other reasonable steps to preserve potentially and actually responsive information,

which led to the destruction of the bulk of the information in P-Trax from the date of the Request (which was precisely the information that the Request sought).

Overall, the DOC's willfully deficient response to the Newspaper's Request exemplifies a systemic dysfunction in the DOC's RTKL response system – there is no training; even where written procedures exist, they are ignored or otherwise not followed; and the DOC has been a party to multiple RTKL appeal proceedings where the agency scrambles after-the-fact to cover-up its failings.

IV. IN THE ALTERNATIVE, SANCTIONS ARE APPROPRIATE UNDER THE JUDICIAL CODE FOR THE DOC'S CONDUCT DURING THE PENDENCY OF THE ENFORCEMENT ACTION

The Commonwealth Court shifted slightly more than half of the Newspaper's fees incurred in the enforcement action, which spanned years of litigation through pleadings, judgment on the pleadings, three rounds of written discovery, multiple depositions, cross motions for summary judgment, pretrial briefing and submissions, a trial, and post-trial briefing and submissions. Although the Newspaper incurred over $215,000 in fees and costs throughout the arduous action, the Commonwealth Court only awarded approximately $118,000 in fees.

The Commonwealth Court's fees award can be affirmed on alternative grounds under the Costs Act which, as stated, is available to combat improper

conduct during judicial proceedings. (See Sect. II(B), supra).[20] Judge Simpson did not evaluate fee shifting under the Costs Act because he concluded that the RTKL was available to combat the DOC's bad faith. (Fee Shifting Opinion, at 11).[21]

The Costs Act authorizes fee shifting in response to "dilatory, obdurate or vexatious conduct during the pendency of a matter" or "because the conduct of another party . . . was arbitrary, vexatious or in bad faith." 42 PA. CONS. STAT. ANN. §2503(7) & (9). "[A]n award for counsel fees under Section 2503 . . . is meant to compensate the innocent litigant for costs caused by the actions of the opposing party." Carlson v. Ciavarelli, 100 A.3d 731, 745 (Pa. Commw. Ct. 2014). Fees are appropriate when a party's conduct lacks sufficient basis in law or fact, is intended solely to cause annoyance, lacks reason, or otherwise includes an improper purpose. See Hart v. Arnold, 884 A.2d 316, 342 (Pa. Super. Ct. 2005).

As discussed further above (see Sect. III, supra), the DOC acted in bad faith. Most important for the analysis in this section, the DOC refused to comply with the clear directives of the Commonwealth Court during the pendency of the enforcement action, further prolonging the litigation and significantly multiplying the Newspaper's legal spend. Even when the Commonwealth Court expressly told

[20] The Newspaper also alleged that a contempt sanction was appropriate for the DOC's refusal to comply with the Commonwealth Court's orders. (See Newspaper's Post-Hearing Brief Regarding Attorney Fee Shifting, filed Aug. 17, 2018, at 10; Fee Shifting Opinion, at 4 n.3).

[21] Additionally, because the DOC defied the Commonwealth Court's directives in its Summary Judgment Opinion, the DOC should be subject to a $500 per day fine. See 65 P.S. §67.1305(b).

the DOC what documents were responsive to the Newspaper's Request, the DOC continued its stonewalling tactics and refused to make a voluntary production.

On December 19, 2016, the Court issued its Summary Judgment Opinion. (DOC Brief, Exhibit C). The Court identified specific categories of records that the Court deemed responsive to the Request and within the disclosure obligations stated in the OOR Final Determination. (Id. at 12-16, and accompanying Order). The Commonwealth Court further explained, "[a]s to compliance with the OOR's Disclosure Order, it is evident that DOC did not disclose responsive records . . . . These [previously identified/described] records fall within the Disclosure Order. Yet, it appears that these records remain undisclosed." (Id. at 18).

Later, in its Bad Faith Opinion, the Commonwealth Court further recounted that "[w]hen this Court confirmed in the Summary Relief Opinion that such records were responsive . . . *DOC still withheld responsive records.*" (Bad Faith Opinion, Doc Brief, Exhibit B, at 13). Instead, the Newspaper had to continue to litigate for access. As Judge Simpson explained:

> Once the Court issued the Summary Relief Opinion, there was no excuse for further delay [in the DOC's compliance with the OOR's Disclosure Order]. Yet, *DOC forced Requestor to expend time and resources to discern what responsive records remained undisclosed.* Under these circumstances, *DOC's persistent denial of access constituted bad faith.*

(Id. at 22). The Commonwealth Court determined that even as of its Bad Faith Opinion in March 2018, the DOC continued to block access. (Id. at 22-23).

The DOC's excuse for not producing documents in response to the Summary Judgment Opinion is one of blissful ignorance. The DOC postured that although the Commonwealth Court clearly stated that certain "records are fairly comprised within the OOR's disclosure order, [the Commonwealth Court's opinion] does not actually order the Department to disclose them at that juncture." (DOC Brief, at 30). In fact, the DOC admitted that "*while it might have been more judicious to disclose records* . . . the Department at that time was under no clear obligation to disclose those records." (Id.) (emphasis added). Therefore, despite recognizing that it was on notice of which records were comprised within the OOR's Final Determination, that it would be most judicious to produce the same, and that there was some obligation to disclose records (albeit not a "clear" enough obligation by the DOC's estimation), the DOC continued to refuse access.

The DOC cannot shield itself merely because Judge Simpson held that certain documents were subject to disclosure under the OOR Final Determination, but failed to add "and the DOC should produce the same immediately." Such a repetitive directive from Judge Simpson would be superfluous because *the DOC remained under a preexisting duty to produce responsive documents*. The OOR's Final Determination, issued in December 1, 2014, directed the DOC to produce

"all responsive records." Judge Simpson's Summary Judgment Opinion two years later erased any doubt as to the universe of "all responsive records."

The DOC had thirty days to appeal the OOR Final Determination, 65 P.S. §67.1301(a), but did nothing at all by way of appeal, challenge, or compliance. The DOC always remained under a production duty pursuant to the OOR Final Determination. A second, explicit, repetitive directive from the Commonwealth Court was unnecessary. The DOC agreed all along that "*all* the information" in the Chronic Care Clinics, Mortality Lists, and Oncology Database (*i.e.*, the same information highlighted as responsive by the Summary Judgment Opinion) was, at the very least, responsive to the Request, and "should have been produced" from the very beginning. (R. 1179a:23-1180a:15; see also R. 1218a:1-7) (emphasis added). The DOC's current legal argument is unconnected to the underlying facts, an improper attempt to side-step its preexisting disclosure obligations via semantics, and another instance of the DOC's preference for nondisclosure.

The Newspaper incurred an additional approximately $114,000 in fees after December 2016 during the enforcement action. (See Newspaper's Post-Hearing Brief Regarding Attorney Fee Shifting, filed on Aug. 17, 2018, at 13-14, 19-20 (fees chart and timeline); see also Fee Shifting Opinion, at 11 n.9). Accordingly, even if the Court determines that the RTKL fee shifting provision is inapplicable, the Commonwealth Court's determination that approximately $118,000 of the

Newspaper's fees should be reimbursed can be affirmed nearly to the dollar on alternative grounds due to the DOC's bad faith during the enforcement action.

CONCLUSION

For the reason set forth further above, the Newspaper respectfully requests that the Court affirm the decisions of the Commonwealth Court.

Respectfully submitted,

Dated: January 21, 2020

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that requires filing confidential information and documents differently than non-confidential information and documents.

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I certify that this brief complies with the applicable word count limitation, 14,000 words, set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1) based upon a word count performed by the word processing system used to prepare this brief.

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IN THE SUPREME COURT OF PENNSYLVANIA

Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines, Appellees	:	77 MAP 2019
v.	:	
Pennsylvania Department of Corrections, Appellant	:	

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IN THE SUPREME COURT OF PENNSYLVANIA

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